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June 19, 2017

Honorable Scott Pruitt, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW (1101A)
Washington, DC 20460

RE: Federal Review of the Clean Water Rule

Dear Administrator Pruitt:

Thank you for the opportunity to provide comments on the important reconsideration of the "Clean Water Rule" by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps). The Clark County Regional Flood Control District (District) appreciates the opportunity to share its perspective on the challenges and opportunities associated with complying with the Clean Water Act and the recently revised definition of "waters of the United States".

Established in 1989, the District is the regional agency responsible for planning, funding, implementing and maintaining infrastructure in Southern Nevada to protect residents and visitors from the ravages of flooding. The District is committed to, and has a long history of complying with, the Clean Water Act and protecting the region's aquatic resources. However, complying with the Clean Water Act in general, and Section 404 in particular, has become increasingly arduous and economically burdensome with little benefit to aquatic resources impacted by the activities funded by the District and its member agencies. The District has worked closely with its member agencies and the Corps to maintain compliance with the Clean Water Act where necessary in the implementation of the District's Master Plan. In fact, District's Policies and Procedures require all environmental compliance to be completed prior to the project being eligible for construction funding. Since 2000, the District has spent more than \$5.5 million on mitigation for impacts to approximately 40 acres of wetlands and/or waters of the United States. This amounts to roughly \$136,000 per acre. Approximately 40 percent of all District projects require some kind of formal compliance with Section 404 of the Clean Water Act and 20 percent require some form of mitigation, either on-site or through a mitigation bank of in lieu fee program.



Honorable Scott Pruitt, Administrator
June 16, 2017
Page 2

A significant problem with the current application of waters of the United States is the extent to which it ignores the variation in climate and geology from different regions of the country. Furthermore, it does not take into account the extent to which the state governments should have the primary responsibility for ensuring clean water in the states. The EPA and the Corps have the opportunity by revising the rule to reinforce and make clear that waters that are not jurisdictional as “waters of the United States” are subject to other sections of the Clean Water Act and are regulated by the States accordingly.

The District supports the EPA and Corps initiative to revisit the 2015 Clean Water Rule and revise the definition of waters of the United States consistent with the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (hereinafter *Rapanos*). As outlined in the *Rapanos* plurality opinion, the definition of waters of the United States should be redefined to include only “those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes”. The definition of waters of the United States should also exclude by rule ephemeral streams, wet meadows, municipal separate storm sewer systems and culverts, directional sheet flow during storm events, drain tiles, man-made ditches, dry arroyos and similar features common in the West that were never intended to be considered waters of the United States.

It is our belief that the definition of waters of the United States implemented by the EPA and the Corps was overly expansive *before* the EPA and the Corps issued the revised definition in 2015. In his 2006 opinion in for the Court, Justice Scalia wrote that in “deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers...exercises the discretion of an enlightened despot, relying on such factors as ‘economics,’ ‘aesthetics,’ ‘recreation,’ and ‘in general, the needs and welfare of the people” where “Any plot of land containing such a channel may potentially be regulated as a ‘water of the United States’”. Little has changed in the 11 years since *Rapanos* was decided and the compliance challenges raised by Scalia have only become more problematic.

The District strongly supports the “repeal and replacement” of the 2015 Clean Water Rule with a definition of waters of the United States that is more in line with Justice Scalia’s plurality opinion in *Rapanos*. To better understand the importance of the *Rapanos* opinion, it is important to understand how the Corps and EPA view ephemeral washes in the desert southwest. Under the existing interpretation, the Corps and the EPA treat most ephemeral washes as tributaries to waters of the United States and would thereby subject these washes to the permitting requirements of Section 404 of the Clean Water Act. While it is true that some ephemeral streams are headwaters for the nation’s



Honorable Scott Pruitt, Administrator
June 16, 2017
Page 3

major rivers, this is not the case in the desert southwest. Most ephemeral washes in the desert southwest may not convey any actual water to downstream waters for years on end. In these washes, the presence of an ordinary high water mark indicates only that water has flowed through the area at some time in the past, not that it ordinarily flows through there.

Justice Scalia's discussion of ephemeral washes in the *Rapanos* opinion is a more appropriate and measured approach:

The restriction of the "waters of the United States" to exclude channels containing merely intermittent or ephemeral flow also accords with the common sense understanding of the term. In applying the definition to "ephemeral streams," "wet meadows," storm sewers and culverts, "directional sheet flow during storm events," drain tiles, man-made ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term "waters of the United States" beyond parody. The plain language of the statute simply does not authorize this "Land is Waters" approach to federal jurisdiction.

The District supports the approach outlined in the *Rapanos* plurality opinion that views waters of the United States as conferring jurisdiction only over "relatively permanent bodies of water". Therefore, the definition of waters of the United States should be redefined to include only "those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes".

For the past few weeks, the District has been coordinating closely with western stakeholders and the Nevada Association of Counties to draft a "model" definition of the waters of the United States. This coalition of stakeholders worked diligently to draft a definition of waters of the United States that is consistent with the dictates of Scalia's *Rapanos* plurality opinion and provides additional recommendations for how to interpret concepts like "relatively permanent waters" and "continuous surface connection". The District supports the combined efforts of stakeholders from 5 western states and have attached the proposed revision for your consideration.

We also ask that the Corps and EPA consider developing GIS-based maps of waters considered jurisdictional under the Clean Water Act. These maps could be developed in conjunction with the EPA, Corps and state and local agencies, thus allowing the states and regional agencies a voice in the process. Once acceptable to all parties, the maps would define what is jurisdictional and what is not, which will give public agencies and



Honorable Scott Pruitt, Administrator
June 16, 2017
Page 4

private landowners certainty regarding the requirements they will face to develop land in the mapped jurisdictional areas. Producing these maps would satisfy the EPA's stated goal of the Clean Water Rule to make "the process of identifying waters protected under the CWA easier to understand, more predictable, and consistent with the law...".

Thank you again for the opportunity to comment on this important issue. Please feel free to contact me at (702) 685-0000 or at sparrish@regionalflood.org should you have any questions or require more information.

Sincerely,

A handwritten signature in black ink that reads "Steven C. Parrish". The signature is written in a cursive, flowing style.

Steven C. Parrish, P.E.
General Manager/Chief Engineer

SCP:jt:sa